

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DUANE A. SINGLETON,) No. C 12-5399 LHK (PR)
Plaintiff,) ORDER OF DISMISSAL;
v.) DIRECTING PLAINTIFF TO
VOLUNTEERS OF AMERICA, et al.,) PROVIDE MORE
Defendants.) INFORMATION FOR
) DEFENDANT PAROLE AGENT
) GEIGER
)
) (Docket No. 35.)

Plaintiff, proceeding *pro se*, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. On November 4, 2013, the court granted defendants' motion to dismiss for failure to state a claim. On November 25, 2013, plaintiff filed an amended complaint. For the reasons stated below, plaintiff's claims against defendant Kevin Williams and defendant Volunteers of America are DISMISSED without leave to amend.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C.

1 § 1915A(b)(1), (2). *Pro se* pleadings must, however, be liberally construed. *See Balistreri v.*
 2 *Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988).

3 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
 4 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that
 5 the alleged violation was committed by a person acting under the color of state law. *See West v.*
 6 *Atkins*, 487 U.S. 42, 48 (1988).

7 B. Legal Claims

8 In plaintiff's original complaint, plaintiff alleged that he was on parole, and was housed
 9 in a Volunteers of America community/correctional re-entry center. Plaintiff claimed that Kevin
 10 Williams, his case work supervisor, and Parole Agent Geiger were prohibiting plaintiff from
 11 attending his religious services. Further, plaintiff alleged that they were punishing plaintiff for
 12 wearing a "cuffee," which is a male head covering for Muslims. Finally, plaintiff alleged that
 13 the Volunteers of America had a policy of denying their residents due process rights by
 14 punishing them without a hearing.

15 Defendants Kevin Williams and Volunteers of America filed a motion to dismiss for
 16 failure to state a claim because Williams and Volunteers of America were not state actors, nor
 17 did plaintiff allege that they were. The court granted defendants' motion, and gave plaintiff
 18 leave to file an amended complaint if plaintiff could demonstrate that defendants Volunteers of
 19 America and Kevin Williams were state actors. The court also advised plaintiff to provide more
 20 than conclusory allegations.

21 In plaintiff's amended complaint, plaintiff alleges that Kevin Williams and Parole Agent
 22 Geiger jointly conspired against plaintiff to deprive plaintiff of his constitutional rights to attend
 23 Juma Services. Plaintiff claims that both defendants told plaintiff that plaintiff would not be able
 24 to exercise that right because "they" were doing plaintiff a favor by allowing plaintiff to be in
 25 "the program." Plaintiff claims that both Williams and Geiger knew that plaintiff was forced to
 26 be at Volunteers of America due to a condition of plaintiff's parole, and plaintiff would be sent
 27 to jail if plaintiff did not complete the program.

28 Plaintiff also claims that defendants prevented plaintiff from exhausting administrative

1 remedies. Further, plaintiff alleges that defendants Williams and Geiger conspired to punish
 2 plaintiff for wearing a cuffee and failing to remove it. Plaintiff states that Williams knew that
 3 plaintiff must wear the cuffee during prayer, which plaintiff does at least five times a day.
 4 Plaintiff alleges that Williams is trying to dictate when and where plaintiff can pray.

5 Finally, plaintiff alleges that Volunteers of America have failed in their responsibility by
 6 not having any structure to monitor, supervise, or adequately train their subordinates or
 7 employees. Plaintiff asserts that Volunteers of America is colluding with the other defendants.
 8 Plaintiff summarily states that Volunteers of America is retaliating against him, and plaintiff is
 9 getting persecuted for being Muslim.

10 However, again, plaintiff has failed to provide any facts demonstrating that Volunteers of
 11 America or Kevin Williams are state actors. As the court noted in reviewing plaintiff's original
 12 complaint, plaintiff alleges no facts suggesting that the conduct of defendants, comprised of a
 13 private individual as well as a private organization, could fairly be treated as conduct of the State
 14 itself. Plaintiff's amended complaint does not state or intimate that either Williams or
 15 Volunteers of America is a state actor. Plaintiff's amended complaint does not show that either
 16 defendant engaged in a traditionally exclusive public function, was entwined with the
 17 government, was subject to governmental coercion, or willingly engaged in some joint action
 18 with the government. *See, e.g., Byng v. Delta Recovery Services, LLC*, 2013 WL 3897485, *8
 19 (N.D.N.Y. 2013) ("Even assuming that Plaintiff was forced to reside at [the residential drug
 20 treatment center] and participate in their treatment programs, such a requirement as a condition
 21 of parole, without more, does not create state action for purposes of section 1983 on the part of
 22 the residential facility providing the treatment.").

23 Further, although state action may be found where private individuals are willful
 24 participants in joint activity with the State or its agents that effects a constitutional deprivation,
 25 *see Johnson v. Knowles*, 113 F.3d 1114, 1119 (9th Cir. 1997), plaintiff has not shown joint
 26 activity. Instead, plaintiff summarily claims that Williams "conspired" with defendant Geiger,
 27 plaintiff's parole agent. While the "joint activity" test can be satisfied by an agreement or
 28 conspiracy between a government actor and a private party, *see Dennis v. Sparks*, 449 U.S. 24,

1 29 (1980) (private individual jointly acting with state officials may be engaged in conspiracy and
 2 acting “under color of state law”), more than “conclusory allegations” of a conspiracy are
 3 required to consider a private party a state actor, *see Simmons v. Sacramento County Superior*
 4 *Court*, 318 F.3d 1156, 1161 (9th Cir. 2003). *See also Dietrich v. John Ascuaga’s Nugget*, 548
 5 F.3d 892, 899-900 (9th Cir. 2008) (noting that the plaintiff must allege facts tending to show that
 6 the defendants acted under color of state law or authority); *Price v. State of Hawaii*, 939 F.2d
 7 702, 708 (9th Cir. 1991) (“defendant is entitled to more than the bald legal conclusion that there
 8 was action under color of state law”).

9 Accordingly, plaintiff’s claims against defendants Williams and Volunteers of America
 10 are DISMISSED. Because plaintiff has already been given one opportunity to rectify this
 11 deficiency, the dismissal is without leave to amend.

12 The remaining defendant, Parole Agent Geiger, has yet to be served. On January 18,
 13 2013, the court sent a notice of lawsuit and request for waiver to defendant Geiger at the
 14 Volunteers of America, but never received a response. Thereafter, counsel for Volunteers of
 15 America informed the court that defendant Geiger cannot be found at Volunteers of America, nor
 16 is he employed there.

17 Although a plaintiff who is incarcerated and proceeding *in forma pauperis* may rely on
 18 service by the Marshal, such plaintiff “may not remain silent and do nothing to effectuate such
 19 service”; rather, “[a]t a minimum, a plaintiff should request service upon the appropriate
 20 defendant and attempt to remedy any apparent defects of which [he] has knowledge.” *Rochon v.*
Dawson, 828 F.2d 1107, 1110 (5th Cir. 1987). Here, plaintiff’s complaint has been pending for
 22 over 120 days, and thus, absent a showing of “good cause,” is subject to dismissal without
 23 prejudice. *See Fed. R. Civ. P. 4(m).*

24 Because plaintiff has not provided sufficient information to allow the Marshal to locate
 25 and serve defendant Parole Agent Geiger, plaintiff must remedy the situation or face dismissal of
 26 his claims against this defendant without prejudice. *See Walker v. Sumner*, 14 F.3d 1415, 1421-
 27 22 (9th Cir. 1994) (holding prisoner failed to show cause why prison official should not be
 28 dismissed under Rule 4(m) where prisoner failed to show he had provided Marshal with

1 sufficient information to effectuate service). Accordingly, **within thirty (30) days** of the filing
2 date of this order, plaintiff must provide the court with an accurate and current address for
3 defendant Parole Agent Geiger such that the Marshal is able to effect service.

4 **CONCLUSION**

5 1. Plaintiff's claims against defendants Volunteers of America and Williams are
6 DISMISSED without leave to amend. Because the court dismisses defendants Volunteers of
7 America and Williams pursuant to the court's preliminary screening of plaintiff's amended
8 complaint, defendants' motion to dismiss the first amended complaint for failure to state a claim
9 is DENIED as unnecessary.

10 2. Plaintiff must file notice and provide the court with an accurate and current
11 address for defendant Parole Agent Geiger such that the Marshal is able to effect service. If
12 plaintiff fails to provide the court with an accurate and current address for defendant Parole
13 Agent Geiger **within thirty (30) days** of the date this order is filed, plaintiff's claims against this
14 defendant will be dismissed without prejudice pursuant to Rule 4(m) of the Federal Rules of
15 Civil Procedure.

16 3. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court
17 and all parties informed of any change of address and must comply with the court's orders in a
18 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
19 pursuant to Federal Rule of Civil Procedure 41(b).

20 IT IS SO ORDERED.

21 DATED: 4/8/14

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23 LUCY H. KOH
24 United States District Judge
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